

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: NATIONAL FOOTBALL  
LEAGUE PLAYERS' CONCUSSION  
INJURY LITIGATION

No. 2:12-md-02323-AB

MDL No. 2323

Kevin Turner and Shawn Wooden,  
*on behalf of themselves and  
others similarly situated,*  
Plaintiffs,

v.

No. 14-cv-00029-AB

National Football League and  
NFL Properties, LLC,  
*successor-in-interest to  
NFL Properties, Inc.,*  
Defendants.

THIS DOCUMENT RELATES TO:

*Martin v. Kansas City Chiefs Football  
Club, LLC*

No. 14-cv-3381

*Lewis v. Kansas City Chiefs Football Club,  
LLC*

No. 14-cv-1995

**PLAINTIFF ANITA MARTIN'S OPPOSITION AND MEMORANDUM OF LAW  
AGAINST DEFENDANT KANSAS CITY CHIEFS FOOTBALL CLUB INC.'S  
MOTION TO DISMISS THE COMPLAINT FILED  
BY SETTLEMENT CLASS MEMBER ANITA MARTIN**

COMES NOW Plaintiff, Anita Martin, and respectfully submits this memorandum of law in opposition to Defendant Kansas City Chiefs Football Club, LLC's Motion to Dismiss with prejudice her Complaint.

**PRELIMINARY STATEMENT**

Ms. Martin brought her claim for loss of consortium against Defendant in the Circuit Court of Jackson County, Missouri. Defendant thereafter removed Ms. Martin's case to the United States District Court for the Western District of Missouri. Ms. Martin's case was then

consolidated in the Western District of Missouri with the related case of her former husband. The consolidated cases were subsequently transferred to this Court as part of MDL No. 2323.

Ms. Martin's action in this court is not governed by this Court's Class Action Settlement Agreement because Christopher Martin opted out of the settlement on October 14, 2014, and Ms. Martin's claim in federal court is consolidated with and derivative of his claim. Additionally, Ms. Martin effectively opted out of the class by filing her own lawsuit against one of the class defendants. For these reasons, Ms. Martin's claim is also not governed or precluded by this Court's Final Order and Judgment as amended on May 8, 2015.

Only a "reasonable indication" of a party's intent to opt out of a class action settlement is required. *In re Linerboard Antitrust Litigation*, 223 F.R.D. 357, 365 (E.D. Pa. 2004). Ms. Martin's actions reasonably indicated her intent to opt out of the class action settlement and were unambiguously inconsistent with an intention to participate in the settlement. For these reasons, Defendant's Motion to Dismiss should be denied and Ms. Martin's claim should be remanded to state court so that she can proceed on the merits of her individual claim.

### **BACKGROUND**

On December 3, 2013, Christopher Martin and his current wife Yolanda Thompson-Martin were included in a Petition for Damages which alleged, *inter alia*, a loss of consortium claim for his current wife in Missouri state court, *Alexander L. Cooper, et al. v. Kansas City Chiefs Football Club, Inc.*, 1316-CV30043,<sup>1</sup> and named Kansas City Chiefs Football Club, Inc. as a Defendant. The same month, on December 27, 2013, Ms. Martin, Christopher Martin's former wife during the time frame of his alleged incidents, filed an identical petition including a loss of consortium claim *Anita Martin v. Kansas City Chiefs Football Club, Inc.*, 1316-

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<sup>1</sup> See also *Lewis et al v. Kansas City Chiefs Football Club, LLC*, Case No. 2:14-cv-01995-AB ("*Lewis II*") (E.D. Pa. July 27, 2017) (ECF 50.); *In re Nat'l Football League Players Concussion Injury Litigation*, 12-md-02323-AB ("*MDL 2323*") (E.D. Pa. July 27, 2017) (ECF No. 8140.)

CV31813,<sup>2</sup> and named the same defendant, incorporating by reference Christopher Martin's December 3, 2013 petition.

On February 7, 2014, this lawsuit was removed to the United States District Court, Western District of Missouri, *Martin v. Kansas City Chiefs Football Club, Inc.*, Case No. 4:14-cv-00132-BP ("*Martin I*") (W.D. Mo. Feb. 7, 2014) (ECF No. 1). Because Christopher Martin, Yolanda Thompson-Martin, and Anita Martin all asserted claims for damages including loss of consortium for injuries sustained by Christopher Martin for negligence, negligent misrepresentation, and fraudulent concealment against the Chiefs, Ms. Martin's case was consolidated on March 13, 2014, with the action of Christopher Martin pending in the same court. *Martin I* (W.D. Mo. Mar. 13, 2014) (ECF No. 32.) Shortly thereafter, the cases were transferred over objection to this Court to be included in MDL No. 2323. *Lewis et al v. Kansas City Chiefs Football Club, LLC*, Case No. 4:14-cv-00004-BP ("*Lewis I*") (W.D. Mo. Apr. 3, 2014) (ECF No. 42.); *Lewis II* (E.D. Pa. Apr. 4, 2014) (ECF No. 1) (transferring both Ms. Martin and Christopher Martin under *Lewis*); *see also Martin I* (W.D. Mo. June 9, 2014) (ECF No. 33); *Martin II* (E.D. Pa. June 10, 2014) (ECF No. 1.)

On April 22, 2015, this Court issued its Final Order and Judgment (amended on May 8, 2015) approving the Class Action Settlement Agreement. *In re Nat'l Football League Players Concussion Injury Litigation*, 12-md-02323-AB ("*MDL 2323*") (E.D. Pa. Apr. 22, 2015) (ECF No. 6084.) However, class members were allowed to opt out of the settlement by October 14, 2014. *MDL 2323* (E.D. Pa. July 7, 2014) (ECF No. 6084.) On October 14, 2014, Christopher Martin timely opted out of the Settlement Agreement. *MDL 2323*, Rep. of Opt Outs Submitted by Claims Administrator (E.D. Pa. Nov. 3, 2014) (ECF No. 6340-1.) Plaintiff, having a derivative and consolidated claim, intended that her claim be opted out as well and conducted

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<sup>2</sup> *See also Martin v. Kansas City Chiefs Football Club, Inc.*, Case No. 2:14-cv-03381-AB ("*Martin II*") (E.D. Pa. July 27, 2017) (ECF 4); *MDL 2323* (E.D. Pa. July 27, 2017) (ECF No. 8171.)

herself in the litigation as such.

This Court also understood Plaintiff to have opted out, specifically granting leave for counsel for Plaintiff to appear by telephone at the March 27, 2017, organizational meeting of all opt out plaintiffs. *See Lewis II* (E.D. Pa. Feb 23, 2017) (ECF 42); *Martin II* (E.D. Pa. Mar. 24, 2017) (ECF 3.) Pursuant to this court's Order that each opt out plaintiff file a short form complaint on or before July 27, 2017, Ms. Martin filed a Short Form Complaint incorporating by reference the allegations and claim asserted in her state court petition. *See Lewis II* (E.D. Pa.) (ECF 43, 44, 46); *Martin II* (E.D. Pa. July 27, 2017) (ECF 4); *MDL 2323* (E.D. Pa. July 27, 2017) (ECF 8171.) Plaintiff also joined in her former husband's request for her case to be remanded to state court. *Lewis II* (E.D. Pa. July 13, 2017) (ECF 4); *Martin II* (E.D. Pa. July 27, 2017) (ECF No. 5.) On September 27, 2018, Defendant moved to dismiss her complaints filed in *Martin II*, (E.D. Pa. June 10, 2014) (ECF No. 1-1, Ex. A) and *Lewis II* (E.D. Pa. Apr. 4, 2014) (ECF 1), and her Short Form Complaint filed in *Martin* (ECF No. 4) and in *MDL 2323* (ECF No. 8171). Ms. Martin opposes Defendant's motion to dismiss for the reasons set forth herein.

### **ARGUMENT**

Even if Ms. Martin did not individually file a formal, written exclusion request, she nevertheless effectively opted out of the settlement because (1) her federal claim was consolidated with Christopher Martin's and his opt out therefore also had the effect of opting out Plaintiff's claim and (2) Plaintiff effectively opted out of the class by filing her own lawsuit against one of the class defendants, which reasonably indicated her intent to not be included in the settlement.

First, Ms. Martin's claim, after being removed to federal litigation, was consolidated with Christopher Martin's. *Martin I* (W.D. Mo. Mar. 13, 2014) (ECF No. 32.). After their claims were consolidated, they were moved to this Court for MDL. *Lewis I* (W.D. Mo. Apr. 3, 2014) (ECF

No. 42.); *Lewis II* (E.D. Pa. Apr. 4, 2014) (ECF No. 1) (transferring both Ms. Martin and Christopher Martin under *Lewis*); *see also Martin I* (W.D. Mo. June 9, 2014) (ECF No. 33); *Martin II* (E.D. Pa. June 10, 2014) (ECF No. 1.) Accordingly, Ms. Martin has been operating under the understanding that her claim in this court is consolidated with and derivative of Christopher Martin's. For example, both Ms. Martin and Christopher Martin are listed in electronic filings listed in *Lewis II*. *See* Motion to Modify CMO No. 4, *Lewis II* (E.D. Pa. Apr. 24, 2014) (ECF 2); Motion to Remand to State Court, *Lewis II* (E.D. Pa. Dec. 17, 2015) (ECF 24); Joint Request for a Status Conference pursuant to FRCP 16, *Lewis II* (E.D. Pa. Jan. 25, 2017) (ECF 41). Indeed, even Defendants have acknowledged that Ms. Martin's action was previously consolidated with *Lewis I* and replied to their Motion for Remand in a single response, *see Lewis II*, Joint Opp. To P's Mtns to Remand, n. 2 (E.D. Pa. Sept. 25, 2017) (ECF 60); *Martin II*, Joint Opp. To P's Mtns to Remand, n. 2 (E.D. Pa. Sept. 25, 2017) (ECF 6.), and have captioned this Motion to Dismiss as related to both *Lewis II* and *Martin II*, *see MDL 2323* (E.D. Pa. Sept. 27, 2017) (ECF 10282); *Lewis II* (E.D. Pa. Sept. 27, 2017) (ECF 70); *Martin II* (E.D. Pa. Sept. 27, 2017) (ECF 7).

Christopher Martin timely opted out of the Settlement Agreement, and because Ms. Martin's claim is consolidated with and derivative of Christopher Martin's, Ms. Martin by extension also opted out of the settlement agreement. *MDL 2323*, Rep. of Opt Outs Submitted by Claims Administrator (E.D. Pa. Nov. 3, 2014) (ECF No. 6340-1.) The Court has agreed, specifically granting Plaintiff leave to appear telephonically at the March 27, 2017, organizational meeting of all opt out plaintiffs. *See Lewis II* (E.D. Pa. Feb 23, 2017) (ECF 42); *Martin II* (E.D. Pa. Mar. 24, 2017) (ECF 3.) Pursuant to this court's Order that each opt out plaintiff file a short form complaint on or before July 27, 2017, Ms. Martin (like Christopher Martin and the other claimants in *Lewis I* and *II*) filed a Short Form Complaint incorporating by

reference the allegations and claim asserted in her state court petition. *See Lewis II* (E.D. Pa.) (ECF 43, 44, 46); *Martin II* (E.D. Pa. July 27, 2017) (ECF 4); *MDL 2323* (E.D. Pa. July 27, 2017) (ECF 8171.) Plaintiff also joined in her former husband's request for her case to be remanded to state court. *Lewis II* (E.D. Pa. July 13, 2017) (ECF 4); *Martin II* (E.D. Pa. July 27, 2017) (ECF No. 5.)

In the alternative, if this Court should determine that Ms. Martin did not effectively opt out of the Settlement Agreement via Christopher Martin, this Court should nevertheless determine that it was her clear intent to do so. Courts have previously held that "parties had effectively opted out of a class by filing their own lawsuit against the class action defendants, even though they had not filed a formal, written exclusion request[.]" *In re Linerboard Antitrust Litigation*, 223 F.R.D. 357, 366 (E.D. Pa. 2004) (citations omitted).

In *In re Linerboard*, the Court found that "a 'reasonable indication' of intent to opt out is sufficient." *Id.* at 365. In fact, the Court wrote that "[a]ny reasonable indication of a desire to get out should suffice." *Id.* (quoting *Plummer v. Chemical Bank*, 668 F.2d 654, 657 n.2 (2d Cir. 1982)). "This standard is necessary to give effect to the Due Process right to opt out identified by the Supreme Court". *Id.* For this reason, "considerable flexibility is desirable in determining what constitutes an effective expression of a class member's desire to exclude himself [or herself] and any written evidence of it should suffice." *Id.* (quoting 7A Wright, Miller & Kane, Federal Prac. & Proc. § 1787 (1972), at p. 156).

In deciding what is a reasonable indication of intent to opt out, the Court is guided by the fact that "[o]n several occasions, courts have passed on the issue of whether some particular action by an individual constituted an adequate request for exclusion.... The clear theme of these cases is that 'considerable flexibility' should be used in determining what constitutes an effective request for exclusion."

*Council on Social Work Education, Inc. v. Texas Instruments*, 105 F.R.D. 68, 71 (N.D. Tex. 1985) (citing 2 Newberg, Class Actions § 2475r (1977)).

For instance, In *Four Seasons*, the Tenth Circuit held that a class member that filed an opt out notice after the deadline, but had made various previous inquiries and statements during the exclusion period, had indicated a desire to opt out and should be permitted to do so. The court explicitly rejected “a rule that in order to opt out, the request must be explicit.” *Id.* at 1291.

In *McCubrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62 (N.D. Cal. 1976), the court held that various parties had effectively opted out of a class by filing their own lawsuit against the class action defendants, even though they had not filed a formal, written exclusion request”.

*Id.* at 365-66.

Summarizing, the Court held that the law requires only a “reasonable indication” of a party’s intent to opt out in order for an opt out to be proper. *Id.* at 366. “In determining whether a party has given a reasonable indication of its intent to opt out, courts use considerable flexibility.” *Id.*

Ms. Martin effectively opted out of the class through her consistent actions and filings giving “reasonable indication” of her intent to opt out by participating in the organizational meeting of opt out Plaintiffs and by filing her lawsuit against one of the class defendants. *Cf. id.*; *McCubrey v. Boise Cascade Home & Land Corp.*, 71 F.R.D. 62, 67 (N.D. Cal. 1976) (holding that individuals prosecuting their individual suits prior to receipt of notice of the class action suit and that individuals who filed suit after receipt of class action notice but prior to termination of the exclusion period effected substantial compliance with opt-out requirement in class action notice and thus were not bound by class adjudication). Ms. Martin’s filing of her suit in Missouri

state court and subsequent removal to federal court and, over objection, to this MDL clearly communicated her desire to not participate in the class action, including the settlement thereof. *See In re Linerboard*, 223 F.R.D. at 366 (“No reasonable person could view their conduct as expressing a desire to participate in the proposed settlement.” (citing *McCubrey*, 71 F.R.D. at 71)). Ms. Martin’s Short Form Complaint filed on July 27, 2017, to this Court’s order directed to opt out plaintiffs, as well as her motion to have her case remanded, reflects the same. *See Lewis II*, Orders (E.D. Pa.) (ECF 43, 44, 46); *Martin II*, SFC (E.D. Pa. July 27, 2017) (ECF 4); *MDL 2323*, SFC (E.D. Pa. July 27, 2017) (ECF 8171); *Lewis II*, Motion (E.D. Pa. July 13, 2017) (ECF 4); *Martin II*, Motion (E.D. Pa. July 27, 2017) (ECF No. 5.)

Finally, because Ms. Martin opted out either as a result of being consolidated with and derivative of Christopher Martin’s claim or, in the alternative, because she clearly expressed her desire to not participate in the class action by filing suit in federal court, this Court’s Final Order and Judgment, *see MDL 2323* (E.D. Pa. May 8, 2015) (ECF 6534), does not apply to her claims. She has not agreed to be bound by the terms of the Settlement Agreement nor has she executed a release of her claims as to Defendant. Claim preclusion similarly does not apply to Ms. Martin’s claims because she opted out of the Settlement Agreement and therefore there has not been a final judgment on the merits as to her claim. *See, e.g., Lucas v. JBS Plainwell, Inc.*, No. 1:11-CV-302, 2013 WL 12080230, at \*5 (W.D. Mich. Apr. 29, 2013) (“Claim preclusion only bars “the same parties or their privies” from bringing a later suit. *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 528 (6th Cir. 2006) (quoting *Kane v. Magna Mixer Co.*, 71 F.3d 555, 560 (6th Cir. 1995)). A [Plaintiff] who opted out of the class action, would face no such barrier to suit.”).

### CONCLUSION

The courts have previously expressed that “‘considerable flexibility’ should be used in determining what constitutes an effective request for exclusion.” *In re Linerboard*, 223 F.R.D. at 366 (citations omitted). Ms. Martin should be considered to have opted out of the Settlement



Agreement, and Defendant's Motion to Dismiss should be denied.

Dated: October 22, 2018

Respectfully submitted,

**LANGDON & EMISON**

/s/ J. Kent Emison

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on October 22, 2018, a copy of the foregoing was served on all Counsel of record via the Court's electronic filing system.

**LANGDON & EMISON**

/s/ J. Kent Emison

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